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Supreme Court of the United States

OCTOBER TERM, 1947

No. 60

JOSEPH WHITE MUSSER, GUY H. MUSSER, CHARLES FREDERICK ZITTING, ET AL.,

Appellants

vs.

THE STATE OF UTAH,

Respondents

Appeal From the Supreme Court of the State of Utah

BRIEF OF RESPONDENTS

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To the Honorables, The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

This appeal is taken from a decision of the Supreme Court of the State of Utah upholding a finding of the District Court of the Third Judicial District in and for Salt Lake County, state of Utah that the defendants herein were guilty of violation of Section 103-11-1 Utah Code Annotated 1943. The information in this case which was filed in the District Court on April 21, 1944, charges:

"That the said above named defendants, on and between the 1st day of June, 1935 and the 1st day of March, 1944, at the County of Salt Lake, state of Utah, did willfully and unlawfully agree, combine, conspire, confederate and engage to and with and among themselves and to and with divers other persons to your affiant unknown, to commit acts injurious to public morals as follows, to wit:

"That the said above named defendants at the time and place aforesaid did wilfully and unlawfully agree, combine, conspire, confederate and engage to and with among themselves and to and with divers other persons to the District Attorney unknown to advocate, promote, encourage, urge, teach, counsel, advise and practice, polygamous or plural marriage and to advocate, promote, encourage, urge, counsel, advise and practice the cohabiting of one male person with more than one woman and in furtherance and pursuance of said conspiracy and to effect the object thereof did commit the following overt acts: * * * ".

There follows a description of twelve separate and distinct overt acts relied upon by the state as a basis for the conspiracy charge.

Section 103-11-1, Utah Code Annotated, 1943, provides so far as pertinent to this case:

"If two or more persons conspire (1) to commit a crime or * * * (5) to commit any act injurious to the public health, the public morals or to trade or commerce or for the perversion or obstruction of justice or the due administration of the laws;—they are punishable by imprisonment in the county jail not exceeding one year, or by fine not exceeding $1,000."

The evidence presented in the trial court established beyond a reasonable doubt that the defendants named in this action organized themselves together for the purpose of advocating, pro-

moting and encouraging the practice of polygamy and in furtherance of the common purpose that they purchased a house in Salt Lake City at which meetings were held. At these meetings speeches were made by various of the defendants, advocating not merely a belief in polygamy but a present practice of polygamy. Evidence also shows that these individuals in pursuance of their conspiracy published a newspaper known as "Truth," which newspaper likewise advocated not merely a belief in polygamy but a present practice of polygamy. The evidence also indicates that the defendants in this attempted to convert certain individuals to believe in and to practice polygamy at the present time.

The appellants have made fourteen assignments of error but in their brief they have narrowed the assignments of error down to three principal points. For convenience the state will answer these points in the order in which they were raised by the appellants in their brief. Evidence in the case as it appeared in the record will be more fully discussed as each point raised by the appellants is hereafter covered in the state's brief.

THE JURY SELECTION

The first argument made by the defendants in this case was that the manner in which the Jury was selected was an infringement of their rights under the Constitution of the United States. Counsel for the defense assigns not only certain specific questions and answers of prospective jurors touching their qualifications as a basis for the contention that the defendants were not granted a fair trial, but he also cites the general background of the case. The trial was held in a community of which almost half of the residents are members of the Church of Jesus Christ of Latter-day Saints, commonly known as the Mormon Church, and as might be

expected the jury panel contained a number of members of the Mormon Church. Counsel for the defendants then alleges, without an iota of evidence to back his contention, that all members of the Mormon Church are so biased against the defendants in this case that a Mormon would not be able to sit on the jury and give them a fair trial. As a matter of fact it can be seen from reading the record that if any prejudice existed against the defendants in the minds of the Mormon members of the jury panel, it was instilled by defense counsel themselves by their tactics during the jury selection.

In questioning prospective jurors the court allowed counsel for the defense to ask questions directly of these prospective jurors. This goes far beyond the privileges ordinarily accorded defendants in criminal cases within the state of Utah where the established practice is for the court to question the jurors and for the respective counsel to submit questions that they may wish to put, through the Court. In placing questions directly to members of the jury panel, counsel for the defense pointed out that members of the Mormon Church who were guilty of polygamy were immediately excommunicated, and then questioned each individual juror who happened to be a Mormon as to whether or not this attitude on the part of the Church would affect his attitude toward the case. It appears to have been a deliberate design on the part of the defense counsel to attempt to create on the part of the jurors they examined a prejudice which could later be assigned as a basis for their contention that the defendants did not receive a fair trial.

Following are typical questions and answers taken from the record on the examination of prospective members of the jury:

"Q. You understand this group of defendants have been excommunicated from the Church?

"A. I heard you say so this morning. I didn't know definitely."

"Q. Do you know that before anyone is excommunicated they are called up before a certain forum of the Church for examination and given a right to defend themselves?

"A. I didn't know the procedure until I heard you this morning.

"Q. Knowing the fact that they have been tried before the Church and have been adjudged guilty of teaching, preaching or practicing polygamy, would the fact that they have been found guilty of such a charge by the Church weigh in your determinaiton of their guilt or innocence?

"A. Well, after coming here, we received instructions from the Court and after listening to those instructions I thought it was my duty to judge them upon the evidence given.

"THE COURT: Is there evidence here? Mr. Roberts, the rules of evidence apply to these proceedings. There is no evidence here these people were excommunicated.

"MR. ROBERTS (District Attorney): That is very true.

"THE COURT: There is no evidence here that they were excommunicated because of the practice of polygamy or teaching polygamy or unlawful cohabitation or anything else.

"MR. PATTERSON: Now, your Honor, that is the very thing I asked about in the first instance. We want to make a record here to show they have been excommunicated. That was what I was talking about yesterday and today and of course I didn't know now we were going to be permitted to make this examination. And you are entirely right. We must supply that record

and we will make that record and will do so from a book I have here." (Trans. 676 to 682)

The situation is much the same as if an attorney defending an accused criminal were to state to prospective jurors that his client had previously been convicted of many felonies, and then to allege that the fact that the jurors were acquainted with the record of his client would prevent them from being impartial. Certainly an attorney should not be allowed to create a situation in the minds of the jurors which may tend to create prejudice and then complain of such prejudice as a basis for disqualifying the jurors. Counsel for the state recognizes that it has gone outside of the record as set forth in the transcript in making the foregoing argument. However, counsel for appellants has also gone outside the record either in the transcript or the record in its entirety in seeking to imply general bias to members of the Mormon Church. It was therefore the feeling of state counsel that the court should understand the full background that existed in the case at the time of the questioning of the prospective jurors in order that it might properly be able to weigh the argument of counsel.

Let us turn, however, from these general contentions made by the defense counsel to the specific assignments which they make with regard to certain designated jurors. A great number of jurors were examined in this case and many of them were rejected for cause. Some of the defendants' objections for cause, however, were denied by the court, and the denial of the objections to four of the prospective jurors is now assigned as a basis for the contention that the defendants did not receive a fair trial. Each of four jurors, McDonald, Hollingshead, Decker and Arnold, stated that he had formed an opinion regarding the merits of the case. Each of them, however, stated on examination by the court

that it was not such an opinion as would prevent him from giving the defendants a fair and impartial trial and rendering a verdict in accordance with evidence as presented during the hearing.

Counsel for the appellants has taken issue with the majority of the opinions of this Court in three recent cases: Fay vs. People of New York, 67 Sup. Ct. 1613; Adamson vs. People of California, 67 Sup. Ct. 1672; and Foster vs. People of the State of Illinois, 67 Sup. Ct. 1716.

Counsel for the state believe that so far as the decision of the instant case is concerned, it is immaterial whether the majority or the minority opinions of the court in those cases is followed.

Even though the Fourteenth Amendment does not place upon the states the restrictions of the Sixth Amendment to the Constitution of the United States, counsel recognizes the wisdom and justice of the words of Mr. Justice Reed in the Adamson case to the effect that "a right to a fair trial is a right admittedly protected by the due process clause of the Fourteenth Amendment." The evidence in this case establishes that the defendants were given a fair trial. On the other hand, if the opinion of the minority of this Court were to be followed to the effect that the provisions of the Sixth Amendment are guaranteed against infringement by states, these defendants have still been accorded "the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed."

The defendants were granted a jury trial. The trial was held in the state and district wherein the crime was committed. The only question that can be raised, is whether or not the jury was

impartial or, if we are to follow the majority of the opinion of the Court in the three cases above cited, whether or not the defendants had a fair trial. The chief basis for the allegations of he defendants, that they did not receive a fair trial or a trial by an impartial jury, is that four of the prospective jurors stated that they had formed an opinion on the case that it would require evidence to remove. As stated above, however, each of them said that he could give the defendants a fair and impartial trial and that he would decide the case on the basis of the evidence presented. The defendants claim that wherever a juror has such an opinion that it would take evidence to remove the opinion, he is unqualified to sit as a juror in such a case. This contention was raised both in the trial court and in the hearing before the Supreme Court of the State of Utah. The trial court definitely stated that such was not the law in the courts of the state of Utah, and indeed he stated so on good authority.

There are some cases which hold that if a juror has formed an opinion which it will require evidence to remove, he is unqualified to sit as a juror. Recent cases, however, have recognized the fact that human nature is such that a person will form some opinion or impression from any information that he may gain about a case regardless of how unreliable such information may be. Once this opinion or impression is gained it will remain with the individual until some evidence removes it. Therefore, for a juror to state that he has formed an opinion but that it will not require evidence to remove such an opinion is for the juror to state something that is entirely contrary to human experience. The decided trend of recent cases is to the effect that although a juror has formed an opinion such as it will require evidence to remove, he is not unqualified to sit in the case, if in fact his opinion is of such a nature that it will yield to the evidence presented in the case

so that he will be able to give the defendants a fair and impartial trial on the basis of the evidence presented at the trial. The general rule on this point is concisely stated in 50 Corpus Juris Secundum 986 as follows:

> "It has been held that a juror is incompetent if he has formed an opinion which it will require evidence to remove, notwithstanding he states that he can disregard the opinion so formed and render an impartial verdict. On the other hand, it has also been held that the mere fact that a juror has an opinion which it will require some evidence to remove furnishes no certain or proper test of his competency and is not of itself sufficient to disqualify him, since it must necessarily be true in every case where any opinion or impression is formed that some evidence will be required to remove it."

The defense quotes extensively from the old Utah case of Conway vs. Clinton, 1 Utah 215, which held that a juror is disqualified if he states that the opinion he has formed of the case is an unqualified opinion, even though he states that it was not such a strong opinion that it would not yield to the evidence. This case seems to turn upon the phrase "unqualified opinion." The Utah Statutes make ineligible a juror who has an "unqualified opinion" and the case of Conway vs. Clinton stuck closely to the letter of the statute and held that a person who stated that he had an "unqualified opinion" was ineligible. Shortly after Conway vs. Clinton was decided, however, the Supreme Court of the State of Utah decided the case of People vs. O'Laughlin, 3 Utah 133, which establishes the law which is still followed by the courts of the state of Utah. The language of the Court in this case is as follows:

> "The error first alleged is the overruling of the challenge on the part of the defendants, of John Lowder, one of the

jurors, who upon his voir dire said he had heard a report of the facts of the case, from which he had formed an opinion, which he believed to be true, but he did not know that he had ever expressed it; that it would take evidence to overcome such belief; 'I believe it like other reports I hear;' that it was a conditional and not an unconditional opinion; the condition was as to the truth of the story he had heard; 'it was unconditional if the report was true'; when 'I heard the story, I believed there was something in it, of course,' and the conditions about it were, 'in case the transaction did really take place,' that he would require proof in the case before he would be willing to act. That he had no opinion, bias, or prejudice, or belief as to the guilt or innocence of either of the defendants, that would prevent him from acting impartially as a juryman. The challenge was made under the statutory provision disqualifying a juror who has 'formed or expressed an unqualified opinion or belief that the prisoner is guilty or not guilty of the offense charged.'

"We are of the opinion that there was no error in overruling the challenge. The condition of this juror's mind was such as would usually or naturally be formed by any person, upon hearing a report of an alleged commission of crime. He had heard a story; he believed it; he says, 'I believed there was something in it, of course.' 'Nobody disputed it; I believed it like other reports I hear.' It is obvious that this opinion or belief was liable to be changed by the statements of the next person he might meet; this is not a conviction of the mind, a fixed conclusion, 'an unqualified opinion or belief.'

"Impressions, or qualified or conditional opinions, formed upon the mere hearing of a report, which, in the mind of an honest man capable of acting as a juror, easily yield to the testimony of witnesses under the sanction of an oath, having personal knowledge of the facts, constitute no objection to a juror; but an unqualified opinion or belief which

closes the mind against the testimony presented in opposition to it, resists its force, and perverts the judgment, does constitute a good and valid objection; an unqualified opinion or belief is fixed and certain, and is incompatible with reasonable doubt and uncertainty, and is not dependent upon the existence or non-existence of any extrinsic fact. The defendants were entitled to a trial by an impartial jury. This provision of our statute is a simplification of the common law, and the opinions of the state courts, where no statute exists, or where the same or similar statutes are in force, are authority with us in applying the facts in this case to the law, and deducing conclusions. The question at issue is, do the statements of the juror upon his voir dire show him to have had, at the time, an unqualified opinion or belief as to the guilt or innocence of the defendant? In Commonwealth vs. Webster, 5 Cush. 297, Shaw, C. J., said: 'The opinion or judgment must be something more than a vague impression formed from casual conversations with others, or from reading abbreviated newspaper reports. It must be such an opinion upon the merits of the question as would be likely to bias or prevent a candid judgment from a full hearing of the evidence.' This is clearly the law: State v. Wilson, 38 Conn. 126; Curley v. Commonwealth, 84 Pa. St. 151; Staup v. Commonwealth, 74 Id. 458; People v. Reynolds, 16 Cal. 128; Gardner v. People, 3 Scam. 83. In closely balanced cases the appearance of the juror, the manner in which he is examined by the counsel, and its effect upon him, sometimes justly have great weight with the trial judge. In view of this, the court in Ortwein v. Commonwealth, 76 Pa. St. 414, said: 'Much weight, therefore, is to be given to the judgment of the court below, in whose presence the juror appears, and by whom his manner and conduct, as well as his language, are scrutinized.' "

There was in this case no exclusion of jurors on account of color, race, or creed. The jury was taken from the regular jury panel of the district court of the Third Judicial District. It was not a blue

ribbon or a hand-picked jury. It was a fair and impartial jury which could and did give the defendants a fair trial. In passing upon this same assignment of error, the Supreme Court of the State of Utah stated at 175 Pac. (2d) 724, pages 739 to 740:

> "As noted above, the exception taken to the propounded questions of the court was to the effect that if a juror had an opinion which it would take evidence to remove, then he could not be an impartial juror since he could not accord to the defendants and each of them the presumption of innocence. Standing alone, the questions set out hereinabove might be construed by the jurors addressed, and the others present who heard the questions, to mean that the jurors might carry with them to the jury room the opinion formed prior to trial and, unless that opinion was changed by the evidence, return a verdict in conformance therewith. It should not be necessary to say that this is, of course, not the law.
>
> However, at the outset of the examination of the jury, the court instructed all of the prospective jurors that those chosen to serve must determine the facts in accordance with the evidence produced in court; that their verdict should be based solely upon that and nothing else. He pointed out specifically that each defendant was clothed with the presumption of innocence and that unless that presumption was overcome by evidence produced in court which proved the guilt of the defendants beyond a reasonable doubt, they were entitled to an acquittal. In such initial discourse to the jury, the following statement by the court was made: "The mere fact that you have read about this case in the newspapers or that you have discussed it with others or heard it discussed by others, or that you have formed or expressed an opinion based solely upon newspaper accounts of the case or gossip or common notoriety, those things in and of themselves do not disqualify you as serving as jurors on the case if you can in spite of that and nevertheless be fair and

impartial, put to one side any opinion that you have ever formed based upon the sources that I have indicated.' As to the jurors examined and not excused for cause upon challenge, each had indicated that any opinion that he had formed or expressed was based upon newspaper articles, common notoriety and gossip and that none of them had any direct information with respect to the facts in the case. Of numerous jurors the question was asked as to whether that juror could lay aside his opinion and consider the case on the evidence presented in court and finally render a fair and impartial verdict based solely upon such evidence. Just prior to the exercise of peremptory challenges, the court again called attention to the presumption of innocence that attended eac hdefendant and asked generally of the panel as to whether there was any one present on the jury who would not be willing to accord each defendant the presumption of innocence until their guilt was proved beyond a reasonable doubt."

If prospective jurors with opinions such as these are to be excluded from a jury panel, it would be practically impossible to secure a jury in any case which has been given publicity by newspapers. The Constitution and Statutes of the State of Utah are as strict in preserving the rights of the defendant in this regard as are the requirements of either the Fourteenth Amendment or the Sixth Amendment to the Constitution of the United States of America. The Supreme Court of the State of Utah, as guardian of the rights under the Constitution of the State of Utah and the Statutes of the State of Utah, has determined that the defendants in this case received a fair and impartial trial by a fair and impartial jury. There is nothing in the evidence of the case to indicate otherwise.

WOMAN TESTIFYING AGAINST HER HUSBAND

Although there is no assignment of error to support this point, the second argument presented by counsel for the appellants in their brief is that it is a denial of constitutional rights for a court to permit a wife to testify against her husband in a proceeding in which the action against him and others is as to him only deferred and not dismissed. In support of this contention counsel quotes from Section 104-49-3 Utah Code Annotated 1943 which provides that in certain cases a husband or wife cannot without the consent of the other testify against the other. This point arises in this case by reason of the fact that the witness, Helen Smith, was the wife of one of the defendants in the case. However, the husband of Helen Smith was not on trial but rather the action was severed as to him. It was not, however, dismissed.

Counsel for the state have difficulty in seeing just how the appellants maintain that there is a federal question involved in this argument. Certainly, whether or not the Statutes of the State of Utah have been violated was for the Supreme Court of the State of Utah and not for the Supreme Court of the United States to determine. His argument that the permitting of Mrs. Smith to testify in this case is a violation of the Fourteenth Amendment to the Constitution of the United States is at best rather obscure.

So far as counsel for the state are able to determine, appellants' argument is that at common law a woman could not testify against her husband and that therefore this right is protected and preserved by the Constitution of the United States. There is no specific prohibition against testimony of a woman against her husband or a husband against his wife in any of the first ten

amendments. Therefore, if it is to receive the protection of the United States Constitution at all it must be done by the Fourteenth Amendment. It is true that such was the rule at common law and it is also true that such is the rule by statute in the majority of our states at the present time. However, it certainly could not be contended by counsel for appellants that the Fourteenth Amendment preserves inviolate, all of the complex procedures of the common law. If this were true, most of the codifications of our states so far as they relate to criminal pleading and practice would be unconstitutional as being contrary to due process of law. It certainly was not the intent of the due process of law amendment to the Constitution of the United States to freeze in the state in which they existed at the time of the adoption of such amendment all rules of pleading and practice which may have theretofore existed under the common law or by the statutes of the various states. Appellants cite not a single case or authority of any kind to sustain their position that a federal question is raised by this argument.

Let us apply the test of the Fourteenth Amendment to the Constitution of the United States to this purported assignment of error. Is there anything that strikes the conscience as unfair about permitting a woman to testify against the fellow conspirators of her husband in a case where her husband is not even on trial? Indeed, if a woman were so prohibited from testifying, it would be because of an extremely technical and narrow application of a rule of evidence, and not because of anything inherently unfair or unjust in such a procedure.

Furthermore, this question was not raised in the trial court at the time that this evidence was offered As was pointed out by the

Supreme Court of the State of Utah in the opinion from which this appeal was taken:

> "Furthermore the question presented by the assignment of error was not presented to the court below. The only objection interposed below to the testimony of Helen Smith relative to these conversations with Heber C. Smith, Jr., was that it was incompetent, irrelevant, immaterial and hearsay. No objection based on communications between husband and wife was made. An objection to testimony on the ground of privileges was not properly made when based on the ground that it is incompetent. Profit vs. United States, 9th Circuit, 264 Fed. 299: Underhill's Criminal Evidence, 4th Ed., page 682."

FREEDOM OF SPEECH, PRESS, RELIGION AND ASSEMBLY

By rhetoric which almost becomes poetical, counsel for appellans devotes most of his brief to an argument which is not at issue in this case at all and which never was at issue. That people have the constitutional right to express beliefs with regard to the hereafter, including the subject of plural marriage as the means to the "highest salvation," we do not dispute. The State of Utah is not and has not been concerned with any expression of beliefs concerning the hereafter, whether related to marriage or any other subject. The State has enacted statutes which prohibit polygamy and unlawful cohabitation. These statutes relate only to practices within this life, within the boundaries of the State of Utah. Likewise, the criminal conspiracy statute has nothing to do with mere expressions of belief regarding the hereafter. It has to do only with acts and practices in this life. In Tonkray vs. Budge, 14 Idaho 621, 654, 95 Pac. 26, page 36, the Supreme Court of Idaho held that the Constitutional prohibition of polygamy relates only to this life and to the practices in this life:

> "Now, it was evidently the intention of the convention to prohibit more than one celestial or 'time and eternity' marriage, as well as to prohibit more than one terrestrial or 'time only' marriage. But the prohibition on the celestial or patriarchal marriage is only intended to extend to the same period of time and to the same extent as the prohibition on the time marriage, namely, to this life. Constitutions and statutes are drafted and adopted for the government of man, and the regulations of their conduct in a civil and temporal government of human beings in this life. Constitutions and statutes care nothing about what men believe with reference to a future existence. Indeed they intended in this American Union to protect a man in believing anything he wants to believe with reference to the future. They do not deal with beliefs or with acts and practices. They protect any man in believing anything he wants to believe with reference to the future, but they prohibit him from acting or practicing anything in any manner contrary to good morals or the public weal as described by the laws of the land. As stated by Chief Justice Waite in Reynolds vs. U. S., 98 U. S. 145, 25 L. Ed. 244: 'Laws are made for the government of actions; and, while they cannot interfere with mere religious beliefs and opinions, they may with practices.' "

In his assignment of error, counsel for the appellants contends that the Supreme Court of the state of Utah has decided (a) that one may not advocate the practice of a religious belief in the plurality of wives, (b) that one may not teach the practice of a religious belief in the plurality of wives, (c) that one may not counsel the practice of a religious belief in the plurality of wives, and so on throughout the assignments of error. We may search the opinion of the Supreme Court of Utah in vain in an attempt to find any prohibition against counseling or teaching any belief. The case is not concerned with what one believes, but with what one does.

Appellants are not now in a position to make any complaint about what the evidence in the case indicates. They have seen fit to bring before this Court in their transcript of the record less than 5% of the entire thirteen hundred pages which were produced at the hearing. If it is now their contention that there was insufficient evidence introduced at the trial to support the findings of the trial court as sustained by the Supreme Court, they are without the necessary record before this Court with which to prove it. This Court has already held in cast of Clune vs. U. S., 159 U. S. 590; 16 Sup. Ct. 125; that the claim that a verdict is against the evidence cannot be sustained in this Court unless all of the testimony upon the essential facts is presented to the Court. It is not surprising that the appellants should comb the record very carefully and bring before this Court only a small portion of the evidence. It is not surprising that they should want to omit from their transcript of the record the pages and pages of evidence which establish beyond a reasonable doubt that these defendants were engaged in a conspiracy not merely to teach a belief in polygamy but to advocate and encourage the present practice of polygamy. Counsel for the state have taken the position that until evidence is presented before this Court attacking the findings of fact of the Supreme Court of the State of Utah, these findings are conclusive. We have not felt it incumbent upon us to supplement the transcript of record as brought up here by the appellants. We believe the findings of fact by the Supreme Court of the State of Utah are correct and have relied upon the rules of this Court to the effect that unless the entire record is brought up, these findings cannot be attacked on the basis that there is insufficient evidence to sustain them.

Of all the alleged assignments of error filed in this Court by

the appellants, only one, No. (L), has any basis in the decision of the Supreme Court of Utah. Assignment of Error No. (L) is as follows:

> "It is held that an agreement to advocate, teach, counsel and advise other persons to practice polygamy is an agreement to commit acts injurious to public morals."

The Supreme Court of the State of Utah has so found. But again we repeat, the Supreme Court of the State of Utah has made no finding that it is against the law to advocate any belief, but merely that it is unlawful to advocate that others engage in a practice which is contrary to the law of the land. In order to sustain this statement, we quote from the decision of the Utah Supreme Court in this case:

> "Admittedly a person cannot properly be prosecuted for expressing opinions nor for mere belief and personal convictions, however peculiar or repugnant they might seem to others; however, conduct condemned by statute may not 'be made a religious rite and by the zeal of the practitioners swept into the First (or Fourteenth) Amendment.' Murdock vs. Pennsylvania, 319 U. S. 105, 63 Sup. Ct. 870, 873, 87 L. Ed. 1292; 146 A. L. R. 81; State vs. Barlow et al., 107 Utah 292; 153 Pac. (2d) 647.
>
> "Statutes do not attempt to regulate religious beliefs, but conduct. Freedom of speech and religion are not unlimited license to do unlawful acts under the label of constitutional privileges. Expressions and the use of words may constitute verbal acts, words may ignite an inferno of mob violence. As stated by Mr. Justice Holmes, in Schenick vs. United States, 249 U. S. 47; 39 Sup. Ct. 247, 249; 63 L. Ed. 470: 'The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic. It does not even protect a man from an injunction

> against uttering words that may have all the effect of force.' See also Gitlow vs. New York, 268 U. S. 653; 45 Sup. Ct. 625, 630; 69 L. Ed. 1138 when the court said: 'That a state in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare tending to corrupt public morals, incite to crime or disturb the public peace is not open to question.' * * *"

This language of the Supreme Court of the State of Utah is in harmony with the language of this Court in the case of Milwaukee Social Democratic Publishing Company vs. Burlison, 255 U. S. 407, 41 Sup. Ct. 352; 65 L. Ed. 704, where the court stated:

> "* * * Freedom of the press may protect criticism and agitation for modification or repeal of laws, but it does not extend to protection of him who counsels and encourages the violation of the law as it exists * * *"

If the Supreme Court of the State of Utah did not hold that it was unlawful to entertain or to express a belief no matter how repugnant to ordinary sensitivity such belief may be, what did the Court find in regard to the conduct of these defendants? Let us turn again to the language of the Supreme Court of the State of Utah in the case from which this appeal is taken:

> "* * * Contrary to the arguments of counsel, these particular defendants did not merely express beliefs and limit their remarks to mere academic discussions. It is true that they discussed theological topics at some of their meetings, but they also spoke about polygamy in such a way as to evidence the design to induce others to act and pressure was applied to several people. * * *
>
> "Some of the men claimed in public that they had a right to perform polygamous marriages. They proclaimed that polygamy must be lived, one defendant saying that the law

makes no difference with them. One defendant declared that polygamy should be practiced at present; that public relief was instituted by the Lord for polygamy people and that they should get on relief and stay on relief. One defendant announced that it was the duty of women to find other wives for their husbands. Some also announced in meetings attended by persons not indulging in such practices, that no woman should prevent her husband from taking another wife and that she should go along with her husband or else step aside so that he could take another wife and that men should have the courage to act. At one of these meetings one Heber C. Smith, Jr., was made the specific object of remarks of various defendants.

"We cite this evidence of acts which tend to prove the agreement itself which shows a systematized plan to induce others to enter into the practice of polygamy in which scheme of advocacy a number of these defendants participated. Although as hereinbefore stated it is not essential to the existence of a conspiracy that the object of such conspiracy be actually accomplished, it would appear from the evidence that the efforts to induce Heber C. Smith, Jr., to practice polygamy were actually successful and that he and his family were among the victims of this conspiracy. There is some evidence htat Le Baron, with the aid of his wife and the arrangements made by Zitting induced a thirteen year old girl to be his polygamous wife. Zitting told her all she had to do was bear children * * *

"That this agreement contemplated actual inducements and solicitations directed at others is evident from testimony of a defense witness. She testified that defendant Hammon stated at one of the meetings that if a man is interested in a girl who is under age and he wants the girl he should go to the father and first obtain his consent. The witness stated that she understood this to relate to polygamy.

"What we have said hereinabove disposes of the argument

> that none of the defendants did anything except engage harmlessly in the expressions of religious beliefs. In fact some of these defendants willfully broke up the home of Helen Smith by persistently urging and inducing her husband to enter into the practice of polygamy. The solicitations which induced Heber C. Smith, Jr., to enter polygamy, all in opposition to the interest and desires of his wife, Helen Smith, and the consequent broken home from the divorce which followed are a complete answer to the contention that none of the defendants said or did anything which could be construed to be injurious to public morals. The claim that everything was on a voluntary basis and that the wishes of others were respected is unconvincing in view of the unrefuted evidence to the contrary. The contention that all of the defendants confined their activities to expressions of belief without interfering with the rights of others and without attempting to induce others to act is not sustained by the record."

As stated above, the only assignment of error made by the appellants which has any basis at all in the decision of the Supreme Court of the State of Utah is the assignment that the Supreme Court of the State of Utah held that an agreement to advocate, teach, counsel or advise other persons to practice polygamy is an agreement to commit acts injurious to public morals and is unlawful. Indeed the Court did so find; and if this Court holds that the Constitution of the United States preserves to an individual the right to teach, counsel and advise other persons to do acts which are contrary to the laws of the several states, then the conviction of the District Court and the opinion of the Supreme Court of the State of Utah should not be upheld.

In spite of the impassioned plea of counsel for the appellants that the First Amendment to the Constitution of the United States protects the right of individuals to practice polygamy if such

practice is done in conformance with religious belief, counsel for the state do not wish to labor this point. Whether the defendants in this case entered into the practice of polygamy or advocated the practice of polygamy because of a religious belief or because of the desires of the flesh, makes no difference whatever. This Court in the early case of Reynolds vs. the United States, 91 U. S. 145, held that the constitutional guarantee of religious freedom does not protect the right to practice polygamy. This holding was later reaffirmed in the case of Church of Jesus Christ of Latter Day Saints vs. United States, 136 U. S. 1, 10 Sup. Ct. Rep. 792. This position was recently reaffirmed by this Court when on April 2, 19455 the Court dismissed for want of a substantial federal question an appeal from a decision of the Supreme Court of the State of Utah upholding a conviction of certain individuals by a District Court within the state of Utah of the practice of polygamy. Barlow et al. vs. State of Utah, 324 U. S. 829; 65 Sup. Ct. 918; 89 L. Ed. 1396.

The chief distinction between this case and State vs. Barlow is that in the Barlow case each defendant was charged with and convicted of unlawful cohabitation. In this case the defendants were not charged with committing acts of unlawful cohabitation themselves, but with criminal conspiracy to induce other persons to violate the statutes prohibiting polygamy and unlawful cohabitation. The criminal conspiracy charged in this case necessarily involved overt acts committed in furtherance of this unlawful scheme. In this case, as in the Barlow case, the Supreme Court of Utah made it clear that the accused could not be prosecuted for mere expression of a belief and ideals but that the convictions that were upheld were sustained by proof of unlawful conduct. That Court in this ordered dismissal of the case as to all of the defendants except the appellants, not for lack of evidence

of some criminal conduct but by reason of insufficient evidence of a criminal conspiracy charge. As to the appellants here the Utah court observed:

> "Contrary to the arguments of counsel these particular defendants did not merely express beliefs and limit their remarks to academic discussions. It is true that they discussed theological topics at some of their meetings but they also spoke about polygamy in such a way as to evidence a desire to induce others to act and pressure was applied to several people."

If then, we are to accept, as we must, the position that the practice of polygamy is unlawful within the State of Utah, are we not then forced to agree that it is unlawful to advise or encourage others to commit an act which is in itself unlawful? The First Amendment does not protect a person in advocating, counseling or encouraging the commission of crimes. In the case of Gitlow vs. People of the State of New York, 268 U. S. 652, 69 L. Ed. 1139, in upholding the conviction of the appellant for publishing articles designed to incite others to criminal anarchy, the court stated:

> "It is a fundamental principle, long established, that the freedom of speech and of the press, which is secured by the Constitution does not confer an absolute right to speak or publish without responsibility whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom. * * * That a state in the exercise of its police power may punish those who abuse this freedom by utterances inimicable to the public welfare, tending to corrupt public morals, incite crime, or disturb the public peace is not open to question * * * *."

Although Mr. Justice Holmes and Mr. Justice Brandeis dissented from the majority opinion in this case, they dissented merely from the application of the foregoing principles to the facts of the case and not from the principles themselves as laid down by the majority.

Counsel for the defense relies heavily upon the case of United States of America vs. John Barlow et al., in which the United States District Judge of the District Court of the United States for the District of Utah, Central Division, on the 18th day of March 1944, granted the defendants' motion to quash an indictment charging the defendants with conspiracy to commit an offense against the United States Government.

The defendants in that case were charged with a conspiracy to place obscene matter in the mails. The matter complained of was the publication "Truth," the publication of which is also one of the overt acts alleged in this case. In the Barlow case, the United States District Court held that a magazine advocating the practice of polygamy is not an obscene, lewd or lascivious book or pamphlet within the meaning of the United States Statutes, and that the mailing of such publication was therefore not properly the subject of a criminal prosecution. Counsel for the state in this case disagree with the holding of the United States District Judge. However, we do not feel that it is at all controlling in this case. In fact the language of the court in quashing the indictments as set forth in the memorandum of opinion of the court, which is quoted in full in the transcript of record in this case, clearly indicates that his holding would not be applicable to the case now before this Court.

In its opinion, the court stated as follows:

"It is quite natural that when the Congress forbade plural

> marriages and the Church agreed to submit to those laws many of the followers of the Mormon faith felt that they could not conscientiously and sincerely change their beliefs in the face of what they considered the direct command of God to the contrary. The Constitution of Utah prohibits polygamy or plural marriages. It might well be said that any prosecution for violation thereof under our theory of government is purely a local matter for the state rather than the federal government in the absence of the widespread violation of the law."

While a publication encouraging the practice of polygamy may not, within the contemplation of the federal law, be obscene, lewd or lascivious, the fact remains that according to the standards of present day society it is immoral. The federal judge did not have before him the evidence which is present in this case, of broken homes and of girls who were hardly more than children forced into marriages with older men. In his opinion the federal judge implies that this group in practicing polygamy is merely continuing the practice of the Mormon Church, which they regard to be commanded of God. The evidence indicates that the Mormon Church itself abandoned the practice of polygamy at the time of the Manifesto, more than half a century ago, and that this group is a group that has begun the practice of polygamy in relatively recent years. Counsel of course cannot look into the minds of the defendants in this case to determine whether or not they are practicing this principle because of what they believe to be a commandment of God or because of baser motives. Regardless, however, of the motives of the individuals in carrying forward the conspiracy to violate the polygamy laws, it cannot be denied that this practice, if continued unchecked, will lead to a breakdown of the moral standards and practices of the community. So far as the laws of the state of Utah are concerned,

a polygamous marriage is not recognized at all. A man who already has one wife and takes another wife is guilty of adultery if he engages in sexual relationship with her, and the woman is guilty of the crime of fornication. Can it be successfully argued that to encourage persons to engage in practices which the law recognizes as adultery and fornication is not an offense against public morals? The Supreme Court of the State of Utah during territorial days held in the case of People vs. Hampton, 4 Utah 258, 9 Pac. 508, that a conspiracy to keep a house of prostitution is an indictable offense. In the case of State vs. Wilson, 28 S. E. 416, 129 N. C. 650, the Supreme Court of the State of North Carolina held it to be criminal to enter into a conspiracy to procure sexual intercourse with a woman through a pretended marriage. What more is this than a pretended marriage? So long as we are to recognize the validity of the law prohibiting polygamy, we cannot say that it is not contrary to public morals to encourage the practice of polygamy.

This Court has held in many cases that before freedom of speech may be suppressed, the particular speech at which the suppression is aimed must present a clear and present danger to established government. However, the Court also stated "this court has not yet fixed the standard by which to determine when a danger shall be deemed clear; how remote the danger may be and yet be present." Whitney vs. California, 274 U. S. 357, 71 L. Ed. 1095, Bridges vs. California, 314 U. S. 252, 86 L. Ed. 192. Certainly it would not be necessary for a person to advocate overthrowing the government in its entirety before an utterance could be held to present a clear and present danger to existing government. Lawful governments are built upon law, and anything which encourages violation of this law presents a threat to that government. Certainly there is a clear and present danger to existing

government when a person openly advocates that another person commit a felony, which is just what these defendants in this case have been doing.

Let us take the comparison used by this Court in the Reynolds case, supra. Suppose instead of believing in the practice of polygamy, this group of defendants now before the Court believed that the laws of God require religious organizations to make human sacrifice. Suppose, further, that in their church meetings they exorted those present and within their hearing to go out on the streets of the city, select a likely looking victim and bring him into the meeting for the purpose of taking that victim's life to appease the imagined will of God. Would it be said that these utterances did not offer a clear and present danger to existing government? And yet the practice of polygamy is not less a felony under the laws of the state of Utah than is the commission of the crime of murder.

Suppose a group of modern Fagins were to conspire together for the purpose of soliciting juveniles and instructing these juveniles in the methods of the commission of crime and were to urge the commission of these crimes on their charges. Could it be said that the words uttered by these individuals held no present or imminent danger to established government? And yet here we have a group of individuals advocating the practice of polygamy, which is a felony just as larceny and robbery are felonies. Many who listened to their words and were led into this practice were juveniles. Once we have held that the state has the power to prohibit the practice of polygamy and to make the practice of polygamy a crime, then the practice of polygamy is placed upon the same basis as any other crime; and one who encourages, aids or abets the practice of polygamy is placed upon the same basis

as one who encourages, aids or abets the commission of any other crime. If we are to allow the individuals to advise and encourage the practice of polygamy, then, by the same standards, we must allow individuals freedom of speech to advise the commission of any crime. If this is permitted can it be denied or even doubted that a clear and imminent danger to government exists?

CONCLUSION

In spite of efforts by counsel for the defense to place the halo of religion around the activities of these defendants, the cheap, immoral and shoddy character of their activities stands out clearly in the evidence presented in the case. Counsel states that what these people were doing cannot be wrong or immoral because of the fact that the descendants of polygamous marriages in the early Mormon Church have turned out to be distinguished members of the community. What does this prove? Alexander Hamilton was an illegitimate and yet rose to occupy honorably one of the highest offices in this land, but is that an argument for promiscuous sexual relations? The laws of genetics have no relationship to the laws of morality. These individuals have chosen to follow a pattern of life contrary to the moral standards and the laws of the state in which they live. Not only do they follow these practices themselves, but even worse, they try to force them upon other individuals. They are not being persecuted for a religious belief. Again counsel for the state repeat: Let them believe what they will and the state of Utah will make no effort to stop them, but when they attempt to force not only their beliefs but their practices upon others, then it becomes the concern of established government.

The appellants now before the Court have been convicted

in a fair and impartial trial of a conspiracy to carry on acts contrary to good public morals and acts which threaten the very existence of organized government. Their conviction should be sustained.

Respectfully submitted,

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